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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

July 29, 2005

The Honorable Thomas Barnett
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Acting Assistant Attorney General Barnett and Chairman Martin:

We write to you concerning the consolidation now underway in the telecommunications industry, specifically SBC's proposed acquisition of AT&T and Verizon's proposed acquisition of MCI. We believe that these two mergers raise very important competition and communications policy issues and should be examined carefully by both of your agencies. We have reviewed these transactions extensively at the Judiciary Committee and at the Antitrust Subcommittee, including holding two hearings regarding the competitive consequences of these deals over the last several months.

These proposed mergers would each combine one of the nation's two largest regional bell operating companies ("RBOCs") with one of the largest internet backbone and long distance companies. Moreover, the acquiring RBOCs, AT&T and MCI compete for business customers and, until recently, competed for residential consumers as well. These mergers are the most fundamental reshaping of the telecommunications marketplace since the break-up of the old Bell company phone monopoly more than twenty years ago. The acquiring RBOCs will become the dominant providers of many telecommunications services in their regions after these mergers are completed.

We recognize that the telecommunications marketplace has changed drastically since the AT&T break-up in 1984. The rise of new technologies and new modes of communications, ranging from wireless phones to the internet, have given consumers an expanded array of choices and products, and led to lower prices and increasingly efficient means of communications. Continued technological development is likely to benefit consumers and further diversify the marketplace. And competition among the various parties, at least in the residential sector, does not appear to be as strong as it once was; accordingly, that element of these transactions may not require the level of scrutiny that would have made such deals "unthinkable" in the past. In fact, it is our best judgment that the mergers, on balance, do not "substantially lessen competition" as understood under the antitrust laws.

Nonetheless, like many mergers these deals may pose anticompetitive problems if approved without modification, and given the size and competitive heft of the various companies involved, the deals do appear to raise a number of concerns. Many of those concerns have been answered by the parties with one response - - "intermodal competition," i.e. competition from different types of telecommunications services. Accordingly, it seems appropriate to consider if intermodal competition really is a solution to the concerns raised and, if it is, to consider steps that might be necessary to ensure its existence.

We believe, therefore, that a primary concern should be to ensure that the market conditions exist which would allow these intermodal options an opportunity to compete. The merging parties should not be able to utilize the market power likely to be created by these mergers to block or retard the development of these new technologies or to create anti-competitive bottlenecks.

Our examination of these transactions leads us to recommend, therefore, the consideration of certain merger conditions by your agencies in order to avoid the risk of injury to competition and consumers and to prevent anti-competitive barriers in the telecom market. These are:

1. The acquiring RBOCs commit to sell unbundled DSL high speed internet service to consumers without requiring that consumers also purchase traditional phone service. Requiring consumers to buy phone service when they purchase DSL service substantially diminishes the incentive of consumers to purchase Voice over Internet Protocol (VOIP) phone service from independent VOIP providers and is therefore a significant barrier to the development of the competitive deployment of VOIP as an alternative to the RBOCs. While we recognize that bundling services offers certain consumer and competitive benefits, in this instance mandatory bundling seems likely to diminish competition more than can be justified by any potential consumer benefit. Further, it should be noted that such a condition would not be onerous - - Qwest is already offering unbundled DSL service and both Verizon and SBC have taken steps towards offering unbundled service as well, albeit on a limited and introductory basis.

2. The acquiring RBOCs commit to a principle of non-discrimination on their networks, a principle that some refer to as "net neutrality." This principle would manifest itself in, among other things, a concrete commitment to refrain from blocking or in any manner degrading the transmission of any competitor data packets, either in the transmission of this data over the internet backbone assets to be acquired by the RBOCs, or on the RBOCs' "last mile" connections to their customers. The result of this would be to assure that, among other things, competitors' VOIP data is treated no differently than any other data packets. Again, such a condition would not be onerous - - both SBC and Verizon have already stated publicly that they do not practice such discrimination and that they will not do so in the future.

3. The acquiring RBOCs commit to provide full access to the RBOCs' 911 and E911 networks on nondiscriminatory terms. There have been several instances where consumers using VOIP phones have been unable to adequately connect with 911 emergency services. As a matter of competition policy it is important that VOIP providers have the ability to ensure such connections are made quickly and routinely; as a matter of telecommunications and public policy it is critical. While this condition may require further technological investment and improvement, SBC and Verizon have already begun to take steps to assure this connectivity is provided and completion of those efforts does not appear likely to impose undue burdens on the parties.

4. The acquiring RBOCs divest duplicative local loop facilities acquired from AT&T and MCI in these transactions, when appropriate. There is a good deal of uncertainty about the extent to which such overlapping facilities exist and the extent to which divestiture would allow enhanced competition. For example, many within the industry claim that significant overlapping local facilities exist and that they could easily and quickly be used by numerous competitive carriers to replace some of the local competition lost as a result of the merger. The merging parties, however, dispute the extent of local facilities' overlap and argue that intertwined systems and the multiple services provided to consumers over these systems would make it difficult and disruptive to divest these local facilities. As you both are aware, divestiture is a traditional, important and often effective antitrust remedy, and so this issue must be carefully explored and resolved in order to determine whether divestiture might alleviate potential anticompetitive impacts in certain local markets.

We also urge that your agencies consider any other conditions upon approval of these mergers that you determine are necessary to preserve competition or protect consumers.

It goes without saying, of course, that as a matter of traditional Clayton Act Section 7 antitrust enforcement any such conditions should be directly tied to the impact of the merger, just as it goes without saying that there is a good deal more leeway for agency action under the public interest standard which guides FCC review. However, the potential imposition of conditions on these mergers does raise a much broader issue of whether it might be more appropriate to regulate uniformly, across the entire industry, rather than focus on these specific companies merely because they happen to be merging at this time. Clearly, broader rules and uniform application are far preferable. It is unacceptable that several pending FCC rulemakings regarding crucial telecommunications regulatory issues (for example, the proceeding on intercarrier compensation, CC Docket No. 01-92; the proceeding to determine the proper regulatory framework for wireline broadband Internet access services , CC Docket Nos. 02-33 and 98-10; the proceeding on pricing of unbundled network elements, WC Docket No. 03-173; and the proceeding to establish rules and pricing regarding special access services, WC Docket 5-25) remain unresolved, and the entire industry is suffering due to the ongoing uncertainty caused by these delays. However, that does not change the fact that four of the largest telecommunications companies in the world are merging; it would be irresponsible competition policy to ignore that reality, and to ignore the effect these deals will have throughout the industry, merely because broader regulatory decisions are unresolved. Sometimes merging parties, when their actions fundamentally reshape a market, must accept restraints that are not immediately shared by the rest of the industry. Accordingly, while rules of uniform application might be preferable, we believe that it is reasonable for merger conditions to be considered in this instance.

Finally, we have also examined the pending merger between Sprint and Nextel in the wireless sector. It appears that this merger does not raise the same concerns as the mergers in the wireline sector, and, indeed, there are strong arguments that it may enhance competition by creating a stronger intermodal competitor to the RBOCs. We urge that your agencies' examination of this transaction be conducted concurrently with the wireline mergers, and that your final decision on the Sprint/Nextel transaction not be in any way delayed by your consideration of the wireline mergers.

We believe that robust and vigorous competition in the telecommunications market is essential to consumers and to our national economy. The two decades following the break-up of the Bell phone monopoly produced an explosion of new technologies and new choices for consumers, choices which substantially reduced the costs of telecommunications services and improved the efficiency and quality of these services throughout the economy. We believe that consideration of the enumerated conditions discussed above will ensure that the benefits of this competitive marketplace not be lost amidst this telecom consolidation.

Thank you for your attention to this matter.

Very respectfully yours,

MIKE DEWINE
Chairman, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights

HERB KOHL
Ranking Member, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights